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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1908

No. 513

GEORGE WEEMS WILLIAMS, RECEIVER OF THE WASHINGTON, BALTIMORE AND ANNAPOLIS ELECTRIC RAILROAD COMPANY, PETITIONER,

vs.

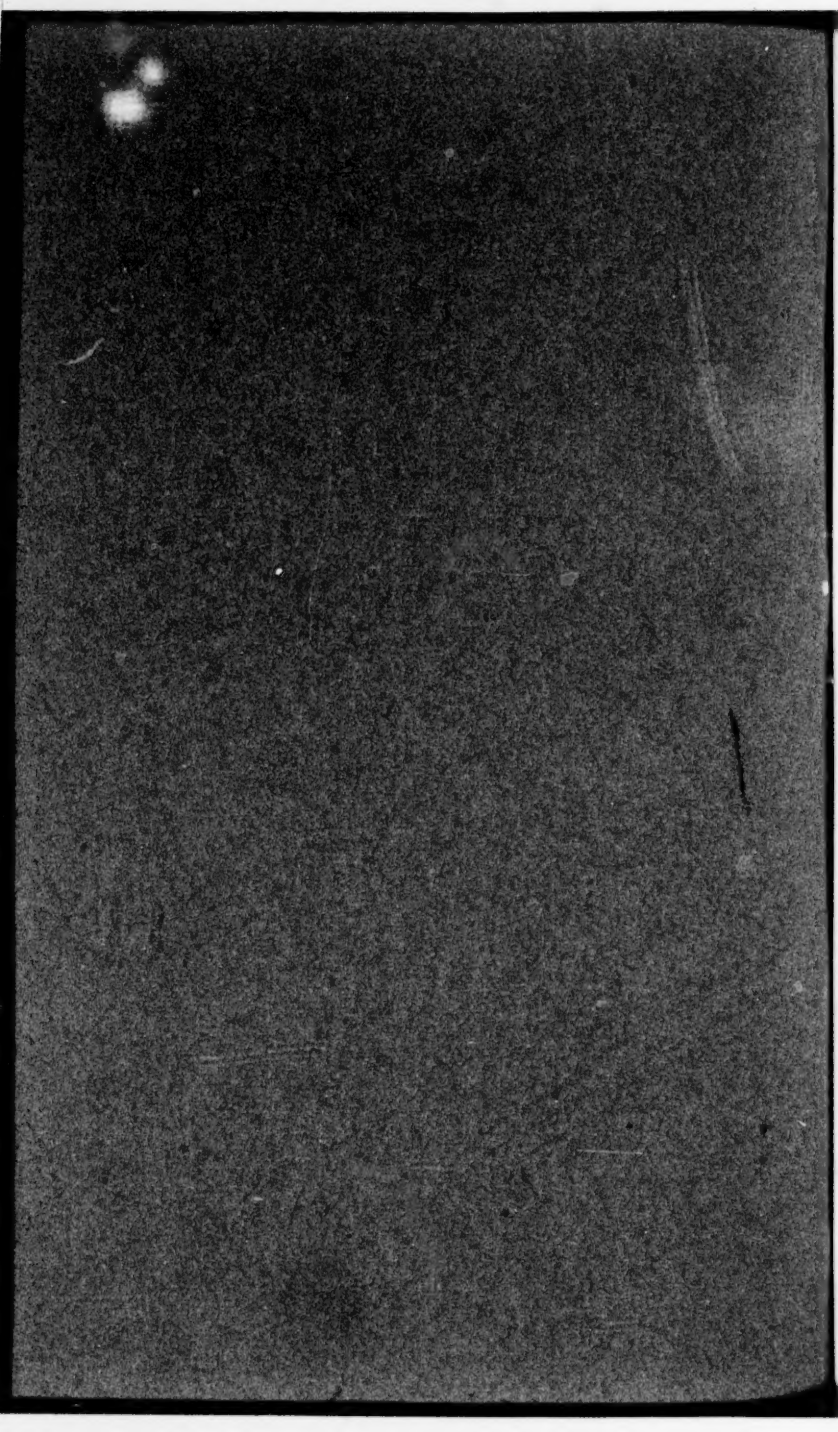
MAYOR AND CITY COUNCIL OF BALTIMORE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITION FOR CERTIORARI FILED SEPTEMBER 14, 1908.

CERTIORARI GRANTED NOVEMBER 2, 1908.

(37,210)



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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 15, 1932

[fols. a-1]

TRANSCRIPT OF RECORD

UNITED STATES OF AMERICA,
District of Maryland, To wit:

At a District Court of the United States for the District of Maryland begun and held at the City of Baltimore on the first Tuesday in March (being the 1st day of the same month) in the Year of our Lord one thousand nine hundred and thirty-two.

Present: The Honorable William C. Coleman, Judge Maryland District; Simon E. Sobeloff, Esq., Attorney; George W. Collier, Esq., Marshal; Arthur L. Spamer, Clerk.

Among other were the following proceedings, to wit:

Equity. No. 1826.

R. E. DUVALL COMPANY, INC.,

vs.

WASHINGTON, BALTIMORE AND ANNAPOLIS ELECTRIC RAILROAD COMPANY

In re petition of Mayor and City Council of Baltimore for payment of taxes by receiver on railroad company's real property for year 1931, with interest and penalties, and for year 1932, and on real property such as rights of way, etc., within the city of Baltimore for year 1931, with interest and penalties, and for year 1932, and for an individual car tax on cars of said railroad company used in city of Baltimore for year 1932, and by amended petition for payment of franchise tax payable quarterly by said receiver under Ordinance No. 123, of the Mayor and City Council of Baltimore, approved April 27, 1906, for year 1931, and for the first quarter of year 1932

[fol. 2] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

MAYOR AND CITY COUNCIL OF BALTIMORE, a Municipal Corporation, Appellant,

vs.

GEORGE WEEMS WILLIAMS, Receiver of the Washington, Baltimore and Annapolis Electric Railroad Company, Appellee

Appeal from the District Court of the United States for the District of Maryland

AGREED STATEMENT OF FACTS—Filed May 23, 1932

This case arises by an appeal from the decree of the Honorable William C. Coleman, Judge of the District Court of the United States for the District of Maryland, dismissing the petition of the Mayor and City Council of Baltimore hereinafter referred to, in the case of R. E. Duvall Company, Inc., a body corporate vs. Washington, Baltimore and Annapolis Electric Railroad Company, a body corporate, in the District Court of the United States for the District of Maryland.

On January 27, 1931, George Weems Williams was appointed by the said Court Receiver of the Washington, Baltimore and Annapolis Electric Railroad Company, a body corporate.

On March 7, 1932, the said Receiver was authorized and directed by said Court to notify any claimant for State, City or County taxes on the railroad property of the defendant corporation that they should file in said Court a petition setting forth said claim.

On April 5, 1932, the Mayor and City Council of Balti- [fol. 3] more filed a petition, pursuant to said order of said Court, setting forth its claims for taxes payable by said Receiver of said Railroad Company on the Railroad Company's real property in the City of Baltimore, viz.: its terminal property and station known as Nos. 100-104 South Howard Street, for the year 1931, with interest and penalties thereto attached, and for the year 1932, and on the real property of the said Railroad Company, such as

rights of way, etc., within the City of Baltimore, for the year 1931, with interest and penalties thereto attached, and for the year 1932, and for an individual car tax on the cars of the said Railroad Company used in the City of Baltimore for the year 1932, and by an amendment to said petition filed May 14, 1932, for the franchise tax payable quarterly by said Receiver of said Railroad Company under an ordinance of the Mayor and City Council of Baltimore, viz.: Ordinance No. 123, approved April 27, 1906, for the year 1931 and for the first quarter of the year 1932.

Ordinance No. 123 of the Mayor and City Council of Baltimore, approved by the Mayor April 27, 1906, granted the right to the Railroad Company to construct, maintain and use railway tracks, with the necessary curves and connections, over certain streets in the City of Baltimore, and to operate cars over and upon the tracks authorized to be constructed, and provided the conditions upon which said rights should be exercised and the compensation to be paid therefor, Sections 13, 14 and 15 of said ordinance providing:

"Sec. 13. And be it further ordained, That in consideration of the several rights, privileges and franchises herein granted to the Baltimore Terminal Company, the Washington, Baltimore and Annapolis Electric Railway Company and the Baltimore and Annapolis Short Line Railroad Company, each of said grantees, their successors or assigns, hereby agrees to pay and shall pay to the Mayor and City Council of Baltimore in quarterly instalments, on the first days of January, April, July and October of each and every year a tax of four and one-half mills for every passenger above the age of twelve years, and of two and seven-tenths mills for every passenger between the ages [fol. 4] of four and twelve years, carried by it, respectively, over the tracks hereby authorized, or any part thereof, for a whole or part trip within the present limits of the City of Baltimore, or as the same may be hereafter extended from time to time, and without regard to the fact that their lines of railway, or any part thereof, are or may be situated upon private rights of way instead of city streets, and also without regard to the fact whether such passenger has boarded the car within or without the

city limits, as the same now exist or may be hereafter extended from time to time; and each of the said grantees also agrees to pay and shall also pay to the said Mayor and City Council of Baltimore in quarterly instalments, on the first days of January, April, July and October of each and every year, a tax of one per cent upon their respective gross receipts derived from mail, baggage, express matter, milk, truck and light freight carried by it, respectively, over any of their respective lines from or to any point on the tracks hereby authorized within the present limits of the City of Baltimore, or as the same may be hereafter extended from time to time, without regard to the place of origin or destination of said mail, baggage, express matter, milk, truck and light freight, and the Baltimore Terminal Company shall also pay to the Mayor and City Council of Baltimore the sum of five hundred dollars, said sum to be paid to the Mayor and City Council of Baltimore upon commencement of work by it under this ordinance."

"Sec. 14. And be it further ordained, That upon the failure of the said grantees, or any of them, their successors or assigns, to comply with any of the terms or conditions of this ordinance, the rights, privileges and franchises hereby granted shall be and become wholly null and void."

"Sec. 15. And be it further ordained, That neither the passage of this ordinance, nor anything contained herein, especially the provision herein for compensation to the city, shall be taken as in any wise prejudicing the pending contention of the city with reference to the assessability and taxability of street franchises or easements."

[fol. 5] The Receiver answered said petition on April 18, 1932, and the amendment thereto on May 16, 1932, denying that the sums of money alleged to be due and payable as set forth in said petition and amendment thereto, were payable by the Receiver of the Railroad Company, and claiming that under Chapter 497 of the Acts of the General Assembly of Maryland of 1931, neither the defendant corporation nor the Receiver thereof was under any obligation or liability to pay the taxes set forth or referred to in said petition or the amendment thereto, and further claiming

that the Act of the General Assembly of Maryland above referred to was valid and constitutional in every respect.

The answer set forth Chapter 497 of the Acts of the General Assembly of Maryland of 1931, which is as follows:

"An act to exempt the railroad property of the Washington, Baltimore and Annapolis Electric Railroad Company, or so much thereof as may be used for railroad purposes by said company, its receiver, successors and assigns, from all State taxes and charges, including contributions to the cost of construction of railroad crossings made or to be made under the authority of the State Roads Commission, and from all county and city taxes and charges in the nature of a tax for the years during which the property is so used, but not exceeding two years beginning January 1, 1931.

Whereas, The Washington Baltimore and Annapolis Electric Railroad Company did not in the year 1930 earn its operating charges, and it is of the utmost importance for the welfare of the State and particularly the communities served by said railroad, that the operation of said railroad be continued; and

Whereas, It is in the judgment of the General Assembly of Maryland a wise and sound public policy to encourage the continued operation of said railroad by the exemption herein provided:

Section 1. Be it enacted by the general assembly of Mary-[fol. 6] land, That the Railroad property of the Washington Baltimore and Annapolis Electric Railroad Company, or so much thereof as may be used for railroad purposes by said company, its receiver, successors and assigns, be exempt from all State taxes and charges, including contributions to the cost of construction of railroad crossings made or to be made under the authority of the State Roads Commission, and from all county and city taxes and charges in the nature of a tax for the years during which the property is so used, but not exceeding two years beginning January 1, 1931.

Section 2. And be it further enacted, That this Act shall take effect June 1, 1931."

The property on which taxes are claimed to be due is railroad property which has been continuously used for

railroad purposes during 1931 and 1932 and for many years prior thereto.

The answer further set forth the financial condition of the Washington, Baltimore and Annapolis Electric Railroad Company; that the Receiver caused a Bill to be introduced into the Senate of Maryland the effect whereof would be to exempt the railroad property from taxation, State, City and municipal; that with his counsel, he appeared before the Finance Committee of the Senate of Maryland and the Ways and Means Committee of the House of Delegates of Maryland and presented the facts relating to the financial condition of said Railroad Company in support of the proposed legislation, and that after a long and continued discussion both in the Committee and on the floor of the Senate and the House, said Bill was passed and became known as Chapter 497 of the Acts of the General Assembly of Maryland of 1931; that the Governor of Maryland held a public hearing on said Act prior to his approval thereof, and that the same session of the General Assembly of Maryland passed legislation exempting from taxation other railroad companies in Maryland. The Mayor and City Council of Baltimore filed in writing a motion to strike out, as impertinent, irrelevant and immaterial, this portion of the answer of said Receiver.

[fol. 7] On May 16, 1932, the said case came on for hearing before said Court. The motion to strike out that portion of the answer referred to above was overruled by the said Judge. An exception to said ruling was taken by said petitioner.

Mayor and City Council of Baltimore, by R. E. Lee Marshall, City Solicitor, Counsel for Appellant.
George Weems Williams, Receiver, by William L. Rawls, Counsel for Appellee.

Approved:

William C. Coleman, District Judge of the United States District Court for the District of Maryland.

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

In Equity. No. 1826

R. E. DUVAL COMPANY, INC., a Body Corporate,

vs.

WASHINGTON, BALTIMORE & ANNAPOLIS ELECTRIC RAILROAD COMPANY

Statement of Testimony—Filed May 18, 1932

Proceedings of Hearing in the Above-entitled Case Before Judge William C. Coleman, May 16, 1932

APPEARANCES

Messrs. Robert E. L. Marshall, City Solicitor; Lawrence B. Fenneman, Asst. City Solicitor, and Hector J. Ciotti, Asst. City Solicitor.

[fol. 8] Mr. Roscoe C. Rowe, City Counsellor, Annapolis.

Mr. William H. Henderson, Assistant Attorney General of Maryland.

Messrs. George Weems Williams, Receiver for W. B. & A. Railroad Company, and William Lee Rawls, on behalf of Receiver.

Thereupon JOHN R. COLGAN, produced as a witness on behalf of the W., B. & A. R. R. Co., having been first duly sworn, testified as follows:

Direct examination.

By Mr. Williams:

Q. Mr. Colgan, what is your place of residence?
A. Baltimore.
Q. Where?
A. 2202 Boone Street.
Q. How long have you been with the Washington, Baltimore & Annapolis Electric Railroad?
A. Seventeen years.

Q. How long have you been auditor?
A. Eight months.
Q. Before then, what were you?
A. Assistant to the auditor.
Q. Have you looked at paragraph 12 of the Answer of the Receiver of the W., B. & A., to the Petition of the Mayor and City Council of Baltimore?
A. I have.
Q. What date was the receiver appointed?
A. January 27, 1931.
Q. At that time, what did the funded debt amount to, and principal of the Railroad Company? You can look at your memorandum.
A. May I get the report?

Mr. Williams: Yes.

Mr. Fenneman: Does the Court desire me to make objection to the testimony as offered or except to the entire testimony?

The Court: I understand you are excepting to it all. You have an exception.

[fol. 9] A. $9,292,500.

The Court: What is this figure?
Mr. Williams: Funded debt, sir.

Q. What were the current unsecured liabilities of the Railroad Company as of the date of the receivership?
A. That, Mr. Williams, I have not in this statement.
Q. Can you get it?
A. Yes, I can.
Q. Here is the answer you checked up.
A. The amount as shown in your answer to the Petition is correct. I have checked the amount there with our records.
Q. $956,256.64.
A. That is correct.
Q. They had how many shares of preferred and how many shares of common?
A. 60,000 shares of common and 35,221 of preferred.
Q. Of what par value?
A. Fifty dollars each.
Q. What interest has been paid on the funded debt since the date of the receivership—I mean what classes of the funded debt?

A. On the Car Trust Equipment Notes, no others.

Q. That is the J. G. Brill Company for equipment?

A. Yes, the J. G. Brill Company and the Baltimore Corporation of Maryland.

Q. What did the Railroad receipts and operating expenses show for the calendar year 1930?

A. For 1930, as stated in your Answer to the Petition. That is correct.

Q. $163,219.81 loss?

A. That is correct.

Q. Does that figure exclude taxes to the State of Maryland and City?

A. Excludes taxes to the State of Maryland and City.

Q. How about bond interest?

A. Excluding bond interest.

Q. Have the gross receipts from railroad operation increased in the last ten years, or decreased?

A. They have decreased.

Q. Has that been continuous?

A. It has been a continuous decrease over that period.

Q. About how many passengers did you carry in 1930 [fol. 10] over the line, revenue passengers?

A. The 1930 figures as stated in your Answer, which I have checked, are correct. The report I have here is for 1931.

Q. 3,247,534 is in the Answer.

A. That is correct.

Mr. Williams: That is all.

Mr. Fenneman: I would like to make a motion to have the testimony stricken.

The Court: Very well. The motion will be overruled.

Mr. Fenneman: Exception noted. If your Honor please, while the auditor is on the stand, there are several provisions of the Petition of the Mayor and City Council that do not specify a definite amount of tax, but which is easily ascertainable by figures supplied by the Railroad Company. For instance, our paragraph 10, car tax, depends on the number of cars in use, and our paragraph 11-a depends upon the number of passengers that used the railroad within the City of Baltimore. If I have permission of counsel, I will endeavor to bring that out.

Mr. Williams: We are perfectly willing that the figures in your Petition can be definitely ascertained after the ruling of the Court.

The Court: Very well; that is agreeable.

Mr. Williams: And the same as to the City of Annapolis.

Cross-examination.

By Mr. Fenneman:

Q. What were the revenues of the W. B. & A. during 1931?

A. What were the revenues?

Q. Yes, total.

Mr. Williams: The Railroad property.

Mr. Fenneman: Total Railroad property.

[fol. 11] A. $1,347,967.03.

Q. That was the gross revenue?

A. That is the gross revenue from operations.

Q. What were the operating expenses?

A. $1,191,897.32.

Q. What do these operating expenditures include, briefly?

The Court: Do you need to go into all of that?

Mr. Fenneman: To show the profit from operations for the year 1931, and I want to show whether something has been left out in the operating expenses that should have been taken into consideration, or not.

The Court: Very well.

A. The railway operating expenses, that is expenses excluding the depreciation charges——

Q. In other words, these operating expenses include cost of the operation of the railroad?

A. That is right.

Q. Except depreciation?

A. That is right.

Q. And except taxes which, according to the contention of the W. B. & A., are not required to be paid. Everything else is taken into consideration, payment to bondholders.

A. No.

Q. Interest?

A. No fixed charges. This is expense necessary for the operation of the Railroad.

Mr. Fenneman: I see; all right. That is all.

Redirect examination:

Mr. Williams: Mr. Stenographer, what were those figures as to revenue and operating expenses which the witness gave?

(The stenographer read as follows: "Gross revenue from operations, $1,347,967.03. Operating expenses, $1,191,897.32.")

Q. The figures you gave excluded fixed charges and taxes?

A. That is right.

(Examination of witness concluded.)

[fol. 12] The Court: Does that conclude the testimony?

Mr. Williams: Yes, sir.

Mr. Fenneman: I would like to offer in evidence an ordinance of the Mayor and City Council of Baltimore, known as Ordinance No. 123, approved April 30, 1906.

Mr. Williams: I think we can save a little time. We will stipulate that you can refer to my ordinance of the Mayor and City Council, and that Mr. Rowe, the City Counsellor of Annapolis, can refer to any ordinance he desires.

Mr. Fenneman: Will you also stipulate as to the charter of Baltimore City?

Mr. Williams: I think that is a perfectly good charter.

Mr. Fenneman: That is all the evidence, as far as we are concerned, if your Honor please.

(Thereupon, counsel for the respective parties argued to the court.)

(Opinion follows.)

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

In Equity. No. 1826

R. E. DUVAL COMPANY, INC., a Body Corporate, Plaintiff,

vs.

WASHINGTON, BALTIMORE & ANNAPOLIS ELECTRIC RAILROAD COMPANY, Defendant

[fol. 13] OPINION (Oral)—Filed May 18, 1932

Baltimore, Md., May 16, 1932.

COLEMAN, J.:

Taking up first, gentlemen, the motion to strike from the answer certain parts of it, I am satisfied from the arguments that in the exercise of sound discretion those parts may very properly form a part of the answer of the Railroad Company. Technically speaking, some of them may not be strictly essential to the questions involved, but I am not disposed to narrow equity pleadings down to very fine technical lines. Therefore, the motion to strike certain parts of the Answer must be overruled.

Mr. Fenneman: Exception.

The Court: Coming to the merits of the case, there is no question but what this court has jurisdiction to consider and determine this matter. In fact, I understand the Supreme Court to have decided in one or more cases that it is the duty of a district court, having assumed jurisdiction under the receivership in a situation of this kind, to determine questions of this very nature rather than to leave them for adjudication in other courts.

Having been given the benefit of extended argument and having, prior to the hearing this morning, had an opportunity to examine what I have always considered to be the leading authorities on this question, I have reached a very definite conclusion, which I do not think can be shaken by any further study of this case (although I do not mean to belittle the work which counsel have done in the preparation and presentations which they have made), that this Act, Chapter 497 of the Acts of 1931 of the Maryland Legislature is a valid law, and that, therefore, the petition in this case must be dismissed.

I assume that this Court is not necessarily bound by anything that has been said in the various decisions of the Maryland Court of Appeals relating to this question, except in so far as those decisions construe the Constitution and Laws of the State of Maryland, and even that would have the limitation that this Court might find that such a [fol. 14] construction there placed would be in violation of some provision of the Federal Constitution. However, my own views concur in what I understand to be the reasoning of those cases, if not expressly, certainly by implication in so far as a case of this kind is concerned.

In other words, without now going at any length into the various decisions to which I have been referred, suffice it to say that I do not consider that such cases as the leading Starr Church case in 106 Maryland, have any direct bearing upon the present question, because they deal with private corporations or individuals. I feel that the question we have here, namely, the inherent power of a legislature in dealing with matters that directly affect the public interest through the agency of a common carrier, embraces a vital distinction and one which we can not lose sight of, because the moment we do, then, of course, we come into the broad field of other cases where it is axiomatic that every one must be put upon a parity in the matter of taxation. And that does not mean that all railroads must not be put upon a parity, but here, as counsel for the Railroad have very properly pointed out, we are dealing with a special situation where equality of taxation is not really the question because there is no other common carrier operating in Maryland under similar conditions, but the question is rather as to the inherent powers of the State Legislature to do the thing which has been done.

I can not distinguish between what has been done here and what I think it must be conceded, even by counsel for the two municipalities represented here, could be done ab initio, namely, if there were no railroad into Annapolis, the Legislature could make similar concessions or greater concessions if in its judgment such were desirable in the public interest in order to insure the construction and operation of such a road.

Here the Legislature has said by the very words of the Preamble of the law that the public interest demands the continuation of the Railroad. So I can not see any real

legal distinction between agreeing to make it possible for the Railroad to continue to serve the public at these localities, and making it possible to start a railroad in the beginning to serve these localities. I assume that any such exemption would have to stand the test at least of reasonableness, and if it did not, regardless of any prior immuni- [fol. 15] ties that may have been granted, regardless of what the Maryland Court of Appeals may have said, I would have to apply the test of the equality clause of the Fourteenth Amendment of the Constitution of the United States. But I do not find that there is anything in the Maryland decisions that I have been referred to, or anything in the expressed purpose of this Act which goes counter to anything that has been said, either expressly or impliedly, in those decisions or in any of the Supreme Court or federal decisions, to which I have been referred. And I think I have examined certainly the great majority, if not all of them, either today or previous to the opening of this hearing.

I, therefore, find that the power in the Maryland Legislature, being inherent to determine what is a public necessity regarding aid of this kind to a common carrier, is limited only by the test of reasonableness, and I am not at all willing now to say that the showing does not meet that test—and the power thus being inherent, it can be exercised in special cases in derogation of the rights which have been given by the Legislature to the subordinate taxing authority, because once we admit that the power is dominant and exists, then we cannot, in the same breath, say that it may be curtailed by the subordinate authorities, counties and municipalities, unless there has been an express intention on the part of the Legislature by some Act so to limit it. I do not find any such intention, and, therefore, I think the necessary implication is that this power existed all the time and may be exercised in this fashion.

If this be true, and if all of the charges exempted are taxes, and I am compelled so to find, then it necessarily follows that the Legislature has not exceeded its inherent power. I confess that the phrase used by Judge Boyd and others, that there is a distinction between "special act" and an "act for a special purpose", is rather confusing to the lay mind and also to the lawyer, but I think the distinction nevertheless exists between this type of case, and

the type of case which is meant to be covered by a special act. I would prefer to say that the distinction can best be described in this manner, viz., that if the Legislature of Maryland had seen fit to limit its own powers, or the framers of the State Constitution had seen fit to limit the powers of the Legislature, with respect to tax exemption of public [fol. 16] service corporations of this character, then this Act would be subject to grave doubt as to its constitutionality, if, indeed, it would not be clearly invalid, as, for example, if there had been a restriction placed, for one reason or another, upon exempting any common carrier of the class of the W. B. & A.; but I have been referred to no such restriction. This same sort of thing has been done in similar cases, as witness the Park Tax Case in the City of Baltimore, where by necessary implication exactly the same sort of legislation is upheld. Therefore in the absence of some express Constitutional or legislative provision placing restrictions on the exemption of railroads from taxation, it seems to me that this is a valid exercise of power, provided there is a prima facie showing of real necessity.

It is a contract, as counsel for the Railroad pointed out. The Railroad obligates itself to do something which it has represented it cannot do unless it is so aided. Whether it can or not, I do not think this court now has to determine, because that takes us into the realm of speculation. The fact remains that the evidence is clear that the Railroad, being in this Court under receivership, was in dire straits financially, and still is. It goes to the Legislature and asks for help. The Legislature says, "If you will make every effort to run, and will run the railroad and serve the public, which would be otherwise without any service, for two years, we will relieve you of this fixed burden during that period." The Railroad contracts to do it, certainly impliedly, because if it does not do it, it does not get the exemption.

If there were one or more other railroads entering Annapolis, or operating through Baltimore or Annapolis, whose conditions and circumstances were similar, then I think it clear that we would get into the question of classification, and would have to determine whether or not the public interest demanded the granting of the exemption to one without granting it to the others. But we have no such situation. This is the only railroad giving this service, and

the Legislature says, in effect, "We consider it highly desirable for the localities served, that this Railroad continue at least for the immediate future." The Railroad makes representation that it cannot do so, or certainly that it would be very difficult for it to do so, without getting all the aid and exemption that it possibly can from taxation. So the Legislature concludes, exercising its inherent power, [fol. 17] that the public interest demands the rendering of this assistance.

I think I have said enough to fully set forth my reasons for deciding that the Act is in no way obnoxious to any provisions of the Maryland or Federal Constitutions, and therefore the petitions must be dismissed.

In United States District Court for the District of Maryland

R. E. Duval Company, Inc., a Body Corporate,

vs.

Washington, Baltimore and Annapolis Electric Railroad Company, a Body Corporate

Decree—Filed May 20, 1932

The petition, as amended, of the Mayor and City Council of Baltimore, and the answer thereto, as amended, of the Receiver herein coming on to be heard, and testimony having been taken in open Court, and counsel for the respective parties having been heard, and the matter having been duly considered, and the Court having delivered an oral opinion that Chapter 497 of the Acts of the General Assembly of Maryland of 1931, is valid and constitutional, it is ordered this 20th day of May, 1932, by the District Court of the United States for the District of Maryland that the petition of the Mayor and City Council of Baltimore, as amended, be and the same is hereby dismissed.

William C. Coleman, U. S. District Judge.

[fol. 18] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed May 20, 1932

And the said Mayor and City Council of Baltimore, petitioner, by its Attorney, R. E. Lee Marshall, City Solicitor, assigns the following errors in the record and proceedings in said cause:

1. The District Court of the United States for the District of Maryland erred in overruling the motion of the petitioner to strike out those portions of the answer of the Receiver to its petition that set forth (a) the financial condition of the Washington, Baltimore and Annapolis Electric Railroad Company; (b) that the same was presented by the Counsel for said Receiver to the Finance Committee of the Senate of Maryland and the Ways and Means Committee of the House of Delegates of Maryland; (c) that the Governor of Maryland held a public hearing on Chapter 497 of the Acts of 1931 prior to his approval thereof; (d) that the same session of the General Assembly of Maryland passed legislation exempting from taxation other railroad companies in Maryland.

2. The said Court erred in admitting testimony and evidence showing and tending to show the financial condition of the Washington, Baltimore and Annapolis Electric Railroad Company, and the said Court further erred in overruling the objection of the petitioner to the admission of such testimony.

3. The said Court erred in holding that Chapter 497 of the Acts of the General Assembly of Maryland of 1931 was valid and constitutional, and further erred in not holding that said Chapter 497 was invalid and unconstitutional.

4. The said Court erred in dismissing the petition of the Mayor and City Council of Baltimore.

For which errors the Mayor and City Council of Balti- [fol. 19] more, petitioner, prays that the said decree of the United States District Court for the District of Maryland, dated the 20th day of May, 1932, in the above entitled cause, be reversed and the cause remanded with directions to al-

low the claim for taxes as set forth in the petition of the Mayor and City Council of Baltimore in the above entitled cause, and to order the Receiver herein to pay the same, and for such other and further relief as may be proper in the premises.

R. E. L. Marshall, City Solicitor, Counsel for Mayor and City Council of Baltimore, Appellant.

In United States District Court

Stipulation of Counsel as to Transcript of Record—Filed May 21, 1932

It is hereby stipulated and agreed between counsel for the parties in the above entitled cause to have transcript made and record printed, pursuant to Rule 23 of the Rules of the Circuit Court of Appeals for the Fourth Circuit.

And it is further stipulated and agreed that the transcript of record shall consist of the following:

1. Agreed Statement of Facts.
2. Testimony.
3. Opinion.
4. Decree.
5. Assignment of Errors.
6. Memo. of Clerk.

[fol. 20] 7. Order to transmit record.

8. Clerk's certification.

Mayor and City Council of Baltimore, by R. E. Lee Marshall, City Solicitor. George Weems Williams, Receiver, by William L. Rawls, Solicitor.

In United States District Court

Memorandum of the Clerk

(1) Petition for Appeal filed 20th May, 1932.

(2) Appeal granted 20th May, 1932.

(3) Appeal Bond dated 23rd day of May, 1932. Obligors: Mayor and City Council of Baltimore, Principal, and

Fidelity and Deposit Company of Maryland, Surety. Conditioned for costs.

(4) Citation dated 20th May, 1932. (Service acknowledged.)

IN UNITED STATES DISTRICT COURT

ORDER TO TRANSMIT RECORD

And thereupon it is ordered by the Court here that a transcript of the Record and proceedings of the cause aforesaid, together with all things thereunto relating be transmitted to the said United States Circuit Court of Appeals for the Fourth Circuit, and the same is transmitted accordingly.

Teste:

Arthur L. Spamer, Clerk.

[fols. 21 & 22] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 23] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 3347

MAYOR AND CITY COUNCIL OF BALTIMORE, Appellant,

versus

GEORGE WEEMS WILLIAMS, Receiver of the Washington, Baltimore and Annapolis Electric Railroad Company, Appellee

Appeal from the District Court of the United States for the District of Maryland, at Baltimore

May 25, 1932, the transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal, appeal bond, and citation are certified up under Sec. 7 of Rule 14.

Same day, the appearance of R. E. Lee Marshall, City Solicitor, and Lawrence B. Fenneman, Assistant City Solicitor, is entered for the appellant.

Same day, stipulation of counsel to place case at foot of docket for argument at the June term, 1932, is filed.

May 27, 1932, the appearance of William L. Rawls and George Weems Williams is entered for the appellee.

May 28, 1932, twenty-five copies of the printed record are filed.

ARGUMENT OF CAUSE

June 30, 1932 (June term, 1932), cause came on to be heard, together with No. 3351, before Parker and Northcott, Circuit Judges, and Glenn, District Judge, and is argued by counsel, and submitted.

[fol. 24] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 3347

MAYOR AND CITY COUNCIL OF BALTIMORE, Appellant,

versus

GEORGE WEEMS WILLIAMS, Receiver of the Washington, Baltimore and Annapolis Electric Railroad Company, Appellee

No. 3351

MAYOR, COUNSELOR AND ALDERMEN OF THE CITY OF ANNAPOLIS, Appellant,

versus

GEORGE WEEMS WILLIAMS, Receiver of the Washington, Baltimore and Annapolis Electric Railroad Company, Appellee

Appeals from the District Court of the United States for the District of Maryland, at Baltimore

[fol. 25] (Argued June 30, 1932. Decided October 3, 1932)

Before Parker and Northcott, Circuit Judges, and Glenn, District Judge

Lawrence B. Fenneman and R. E. Lee Marshall (Hector J. Ciotti on brief) for Appellant in case No. 3347; Roscoe

C. Rowe for Appellant in case No. 3351, and William L. Rawls and George Weems Williams for Appellee.

OPINION—Filed Oct. 3, 1932

PARKER, Circuit Judge:

These are appeals by the Mayor and City Council of Baltimore and the Mayor, Counselor and Aldermen of the City of Annapolis from orders of the court below denying claims filed with the Receiver of the Washington, Baltimore and Annapolis Railway Company. The claims filed were for taxes assessed by the cities of Baltimore and Annapolis for the year 1931 upon the property of the railway company, and for the amounts due under the provisions of ordinances under which the company was allowed to construct and maintain its tracks over the streets of the respective cities. The claims were denied under the authority of chapter 497 of the Acts of Maryland of 1931, which is as follows:

"An act to exempt the railroad property of the Washington, Baltimore and Annapolis Electric Railroad Company, or so much thereof as may be used for railroad purposes by said company, its receiver, successors and assigns, from all State taxes and charges, including contributions to the cost of construction of railroad crossings made or to be made under the authority of the State Roads Commission, and from all county and city taxes and charges in the nature of a tax for the years during which the property is so used, but not exceeding two years beginning January 1, 1931

[fol. 26] "Whereas, the Washington, Baltimore and Annapolis Electric Railroad Company did not in the year 1930 earn its operating charges, and it is of the utmost importance for the welfare of the State and particularly the communities served by said railroad, that the operation of said railroad be continued; and

"Whereas, it is in the judgment of the General Assembly of Maryland a wise and sound public policy to encourage the continued operation of said railroad by the exemption herein provided:

"Section 1. Be it enacted by the General Assembly of Maryland, that the railroad property of the Washington, Baltimore and Annapolis Electric Railroad Company, or so much thereof as may be used for railroad purposes by said company, its receiver, successors and assigns, be exempt from all State taxes and charges, including contributions to the cost of construction of railroad crossings made or to be made under the authority of the State Road Commission, and from all county, and city taxes and charges in the nature of a tax for the years during which the property is so used, but not exceeding two years beginning January 1, 1931.

"Section 2. And be it further enacted, that this Act shall take effect June 1, 1931."

The claims which were denied include taxes imposed by the cities upon the property of the railway company pursuant to Article 81 of the Maryland Code. The taxes so imposed by the city of Baltimore amount to approximately $50,000; those imposed by the city of Annapolis, to approximately $3,000. They also include so-called taxes due under franchise ordinances granted by the cities. These in the case of the city of Baltimore amount to approximately $20,000; in the case of the city of Annapolis, to approximately $2,000. The franchise ordinances of the two cities are substantially similar. The pertinent portions of the Baltimore ordinance, which was passed April 27, 1906, are as follows:

"Sec. 13. And be it further ordained, that in considera- [fol. 27] tion of the several rights, privileges and franchises herein granted to the Baltimore Terminal Company, the Washington, Baltimore and Annapolis Electric Railway Company and the Baltimore and Annapolis Short Line Railroad Company, each of said grantees, their successors or assigns, hereby agrees to pay and shall pay to the Mayor and City Council of Baltimore in quarterly instalments, on the first days of January, April, July and October of each and every year a tax of four and one-half mills for every passenger above the age of twelve years, and of two and seven-tenths mills for every passenger between the ages of four and twelve years, carried by it, respectively, over the tracks hereby authorized, or

any part thereof, for a whole or part trip within the present limits of the city of Baltimore, or as the same may be hereafter extended from time to time, and without regard to the fact that their lines of railway or any part thereof, are or may be situated upon private rights of way instead of city streets, and also without regard to the fact whether such passenger has boarded the car within or without the city limits, as the same now exist or may be hereafter extended from time to time; and each of the said grantees also agrees to pay and shall also pay to the said Mayor and City Council of Baltimore in quarterly instalments, on the first days of January, April, July and October, of each and every year, a tax of one per cent upon their respective gross receipts, derived from mail, baggage, express matter, milk, truck and light freight carried by it, respectively, over any of their respective lines from or to any point on the tracks hereby authorized within the present limits of the city of Baltimore, or as the same may be hereafter extended from time to time, without regard to the place of origin or destination of said mail, baggage, express matter, milk, truck and light freight, and the Batlimore Terminal Company shall also pay to the Mayor and City Council of Baltimore the sum of five hundred dollars, said sum to be paid to the Mayor and City Council of Baltimore upon commencement of work by it under this ordinance.

"Sec. 14. And be it further ordained, That upon the failure of the said grantees, or any of them, their successors [fol. 28] or assigns, to comply with any of the terms or conditions of this ordinance, the rights, privileges and franchises hereby granted shall be and become wholly null and void.

"Sec. 15. And be it further ordained, That neither the passage of this ordinance nor anything contained herein, *especially the provision herein for compensation to the city*, shall be taken as in any wise prejudicing the pending contention of the city with reference to the accessability and taxability of street franchises or easements." (Italics ours.)

Before coming to the question of the constitutionality of this statute, which is the question argued before us by

counsel, we think it well to observe that, as we interpret the statute, it has no application to the moneys due by the railway company under the franchise ordinances, and consequently does not affect the liability of the railway company with regard thereto. It will be observed that it is "the railroad property" which is exempted from taxation; and it is exempted, so far as counties and cities are concerned only from "county and city taxes and charges in the nature of a tax".

"A tax is an enforced contribution of money or other property, assessed in accordance with some reasonable rule of apportionment by authority of a sovereign state on persons or property within its jurisdiction, for the purpose of defraying the public expenses." 26 R. C. L. 13. It differs from a payment due under a contract in that the latter arises out of the agreement of the party from whom it is due, whereas a tax depends not upon consent but upon the sovereign power of the state. State Freight Tax Cases, 15 Wall. 232, 278. A charge exacted by a city for the use of its streets is not a tax. "It is more in the nature of a charge for the use of property belonging to the city—that which may properly be called rental. * * * That by it the city receives something which it may use as revenue, does not determine the character of the charge or make it a tax. The revenues of a municipality may come from rentals as legitimately and as properly as from taxes." St. Louis v. Western Union Tel. Co., 148 U. S. 92, 97; Postal Tel. Co. v. Mayor, etc., [fol. 29] of Baltimore, 79 Md. 502, 24 L. R. A. 161; Mayor, etc., of Baltimore v. Baltimore, etc., R. Co., 84 Md. 1, 33 L. R. A. 503; City of Springfield v. Postal Tel. Co., 253 Ill. 346, 97 N. E. 672; Postal Tel. Co. v. City of Newport, 25 Ky. L. Rep. 635, 76 S. W. 159; 26 R. C. L. 14. And see McQuillin Municipal Corporations, 2d Ed., vol. 4, sec. 1772, where the rule as to requiring compensation upon the granting of a franchise is stated as follows:

"A municipal corporation, having entire control of its streets and power to impose conditions on granting a franchise to use the streets, may require compensation for their use by public service companies, as a condition of the grant of the right to use them, unless forbidden by statute, as by requiring the company to pay a certain portion of its re-

ceipts as compensation for the use of streets, or a certain per cent of the dividends declared, or exacting a license fee of a certain sum for each car to be paid annually to the city or an annual tax on each mile of its tracks. * * * So if the grant of the right to use streets is conditioned on the payment of a certain sum per year, the fact that such charge is called a license tax does not make it such, within the rule that license taxes must be imposed equally on all persons engaged in the same business."

A payment required as a condition of the granting of a franchise to use the streets of a city is not different in principle from the exaction of any other payment by a city as a return for the use of property or facilities furnished by it; and it is uniformly held that such payments are not taxes and are not governed by the rules relating thereto. Thus, the water rent imposed by a city for water which it furnishes is not a tax (Jones v. Detroit Water Com'rs, 34 Mich. 273); nor is a fee imposed for the use of a sewer (Carson v. Brocton Sewerage Com., 182 U. S. 398, 400); nor is a charge for the use of municipal wharves (Parkersburg v. Parkersburg Trans. Co., 107 U. S. 691); nor a toll for the use of an improved highway (State Freight Tax Cases, supra). In St. Louis v. United Railways Co., 210 U. S. 266, 278, the Supreme Court, speaking through Mr. Justice Day, makes clear the difference between payments required as [fol. 30] the condition of granting a franchise and the imposition of a franchise tax. He says:

"It is true that the city in granting the right to use the streets by special ordinance and in exercising by general ordinance the right conferred in the charter to impose a license tax upon cars is dealing with rights and privileges somewhat similar, but, nevertheless, essentially separate and distinct. In the special ordinances the city is making an arrangement with the railway company to confer the right to use the streets in consideration of certain things the company is to do by way of operation and otherwise, including, it may be, payment of fixed sums or a proportion of receipts in consideration of the rights and privileges conferred. The city does this by virtue of its power to grant rights and privileges and control their exercise in the

streets of the city, power expressly conferred in the charter of the city. In the fixing of a license tax upon all companies alike for the privilege of using cars in the city, it is exerting other charter powers. It makes provision uniformly applicable to all persons or companies using street cars. It is a revenue measure equally applicable to all coming within its terms."

There can be no question but that the ordinances here under consideration did not impose license taxes but provided for payments as a matter of contract in return for the privileges and franchises granted. The section requiring the payments provides that same are to be made "in consideration of the several rights, privileges and franchises herein granted"; the following section provides that upon failure of the grantees to comply with the terms and conditions of the ordinances the rights, privileges and franchises granted shall be avoided; and the last section refers to the provision requiring payment of a portion of the fares collected and a percentage of receipts from freight, etc., as "the provision herein for compensation to the city". This shows clearly, not only that the city was making a contract and not levying a tax, but also that this was thoroughly understood at the time. The fact that the ordinance speaks of a "tax" on each fare and a "tax" on receipts from [fol. 31] freight, etc., is immaterial. The nature of the payment provided for in the ordinance depends upon the right under which same is demanded, not upon what the parties may have called it. Postal Tel. Co. v. Newport, supra, Lipke v. Lederer, 259 U. S. 557, 561; Child Labor Tax Case, 259 U. S. 20.

And we do not think that the payments required by the ordinance can be said to be "charges in the nature of a tax." As pointed out by the Supreme Court in the case of St. Louis v. Western Union Tel. Co., supra, they are charges in the nature of rent. A charge in the nature of a tax is a charge exacted by the state in the exercise of its sovereign power, such as a special assessment against property specially benefited by a public improvement, or the case mentioned in the statute itself of enforced contribution to the cost of construction of railroad crossings. Payments required by contract in consideration of the use of public property are in no sense charges in the nature of a tax.

Since the statute upon which the receiver relies relieves only against taxes or "charges in the nature of a tax," and since the payments required by the franchise ordinances do not fall within either classification, it clearly has no application to them. But there is yet another reason why they are not affected. It is only the property of the railway company which is relieved of taxes, not the business which it does; and, even if the payments required by the ordinances be regarded as taxes, they are not taxes on the property of the railroad but on business done by it. As the statute does not profess to relieve against excise taxes, or taxes on business, they are clearly not affected. A statute relieving against taxes on property will not be construed to cover excise or franchise taxes; for it is elementary that exemptions from taxation must be strictly construed. Vicksburg, etc., R. Co. v. Dennis, 116 U. S. 665; Berryman v. Whitman College, 222 U. S. 334, 350; 26 R. C. L. 274.

As the statute has no application to the so-called taxes on fares and on receipts from freight, etc., we need not consider interesting constitutional questions which would arise if it were applicable to them. We will say in passing, however, that if the act were construed to relieve the railroad company against these as well as against taxes on prop-
[fol. 32] erty, a grave question would arise as to whether it would not be violative of Article 3, Section 29 of the Constitution of Maryland, which requires that a law enacted by the legislature shall embrace but one subject. Relief against tax on property and relief against contractual liability with a municipality are certainly two separate and distinct matters. And certainly relieving against liability assumed upon the acceptance of a franchise granted by the city would seem to be in violation of the spirit, if not the letter, of the "Home Rule" provision of the Maryland Constitution, Article 11A.

We come then to the question as to the constitutionality of the statute as applied to the tax imposed on the property of the railroad; and we think it must be condemned as violative of the Fourteenth Amendment to the Federal Constitution, the uniformity provision of the Maryland Constitution and Article 3, Section 33, of the Maryland Constitution, which limits the power of the legislature in passing local or special laws.

Testing the statute by the Fourteenth Amendment, we think that the equal protection of the laws is denied where the property of railroads generally is taxed and the property of one particular railroad is exempted from taxation. The state, of course, has the right to classify property for the purpose of taxation; but a classification to be sustained "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Royster Guano Co. v. Virginia, 253 U. S. 412; Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32. Here there is no classification, but an arbitrary exemption is granted to a single taxpayer. It is said that the corporation is insolvent and that the service which it renders is of importance to the public; but exemption is not granted to other insolvent taxpayers or even to other insolvent railroads. So far as the public service rendered by the corporation is concerned, it should be remembered that its property is dedicated to the public use and the mere fact of insolvency does not justify the abandonment of its operation. Its property is still owned by some one (its real ownership is in bondholders [fol. 33] and creditors) and is still used for railroad purposes; and the financial condition of the corporation holding the legal title furnishes no reasonable basis for exemption when property of others used for railroad purposes is taxed. If the property of all insolvents, or even of all insolvent railroads, were exempted from taxation, a different question would be presented; but, as stated above, we have no attempt at classification but an arbitrary individual exemption.

Upon the question as to whether in levying a tax on property a state may discriminate because of ownership, the case of Quaker City Cab Co. v. Penna., 277 U. S. 389, is in point. In that case the Supreme Court condemned a tax laid on the receipts of corporations from the business of operating taxicabs but imposing no tax on the same kind of business operated by individuals or partnerships. The Court said:

"The equal protection clause does not detract from the right of the State justly to exert its taxing power or prevent it from adjusting its legislation to differences in situa-

tion or forbid classification in that connection, 'but it does require that the classification be not arbitrary but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation.' Power Co. v. Saunders, 274 U. S. 490, 493."

And with respect to the particular tax there under consideration, it said:

"The gross receipts of incorporated operators are taxed while those of natural persons and partnerships carrying on the same business are not. The character of the owner is the sole fact on which the distinction and discrimination are made to depend. The tax is imposed merely because the owner is a corporation. The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed. It follows that the section fails to meet the requirement that a classification to be consistent with the equal protection clause must be based on a real and substantial difference having reasonable relation to the subject of the legislation."

[fol. 34] Here the exemption rests upon no classification whatever except the ownership of the property by the railway company. Other railroads, even insolvent railroads, are not classified with it or given a like exemption. "The Fourteenth Amendment protects those within the same class against unequal taxation; all are entitled to like treatment." Hopkins v. Southern California Telephone Co., 275 U. S. 393, 403. By the exemption in question this like treatment is denied.

And we think that the act clearly violates the uniformity clause of Article 15 of the Bill of Rights of the Constitution of Maryland. That article provides:

"That the General Assembly shall, by uniform rules, provide for separate assessment of land and classification and sub-classifications of improvements on land and personal property, as it may deem proper; and all taxes thereafter provided to be levied by the state for the support of the general state government, and by the counties and by the city of Baltimore for their respective purposes, shall be uniform as to land within the taxing district, and uniform within the class or sub-class of improvements on land

and personal property which the respective taxing powers may have directed to be subjected to the tax levy."

Article 81, section 6, paragraphs (1) and (2) of the Annotated Code of Maryland, 1929 Supplement, provides that all real and tangible personal properties in the state, by whomsoever owned, shall be subject to assessment to the owner and taxation for ordinary taxes in the state and in the county and city in which same are situate. Under this provision, real and tangible personal property of railroad companies is subject to taxation just as the property of other individuals and corporations. The effect of the act in question is to create a special exemption from this tax in favor of the property of this particular railroad company. It would seem to require no argument to demonstrate that a law which exempts the property of one man from taxation, while taxing the property of another in the same class, violates the uniformity provision of the Constitution which we have quoted, and the courts of Maryland so hold. Baltimore City v. Starr Church, 106 Md. 281, [fol. 35] 67 Atl. 261; Schley v. Lee, 106 Md. 390, 67 Atl. 252; Wells v. Hyattsville, 77 Md. 125, 26 Atl. 357. And see Susquehanna Power Co. v. Tax Commission, 159 Md. 334, 343, 151 Atl. 29. And this is in accordance with the construction placed on similar provisions elsewhere. 26 R. C. L. 252; note 19 L. R. A. 77; note 60 L. R. A. at 364 and cases cited; Little Rock, etc., R. Co. v. Worthen, 120 U. S. 97; Railroad Companies v. Gaines, 97 U. S. 697, 710; Hogg v. Mackay, 23 Ore. 339, 19 L. R. A. 77; State v. Richards, 52 N. J. L. 156, 18 Atl. 582.

One of the most recent cases construing this section, and one we think conclusive of the case at bar, is Baltimore City v. Starr Church, supra, 106 Md. 281, 67 Atl. 261, wherein the legislature granted a tax exemption on certain wharf property deeded to a church. The court said with reference to Article 15:

"This provision has, with a slight but not material change in phraseology, been a part of the organic law of Maryland for considerably more than a century. Its predominant object is to provide by a fixed enactment equality in taxation, and to prevent, as far as possible, the burden of supporting the government from falling

upon some individuals, to the exclusion or exemption of others. It prohibits unjust discriminations, and whilst it remains in force the land owner, be his possessions large or small, will have an absolute and complete guarantee that public taxes cannot be imposed upon him while others who are equally responsible in the law may have themselves relieved of this burden by the partiality of legislative enactment, without subserving any public policy. Its theory is that the distribution of the burden over every class of property alike, will lessen the proportion of each individual's contribution, whereby oppressive exactions from the owners of any particular class of property will be impossible. This has been the uniform and consistent principle always followed in Maryland; eminently just in itself as a sound and long accepted axiom of political economy, it has been incorporated in her organic law since November 3, 1776; it has been upheld by her courts and steadily and tenaciously adhered to by her conservative people."

And in condemning the attempted exemption the court observed:

[fol. 36] "If the legislature may lawfully do this in this particular instance, why not in another, and another, until there would be an almost indefinite number of exemptions, and we think such acts should be stricken down as null, and inoperative, repugnant to the organic law, and prolific of obvious abuses."

In recognizing the power of the legislature to exempt certain classes of property, the court said:

"It will not be denied at this late day that the legislature has the power, within reasonable limits, to exempt certain species or classes of property from taxation, when the public interests so require. * * * But it will be perceived in these cases all the property of the class indicated is exempted. * * * There is, therefore, no arbitrary discrimination between different properties of the same kind, but all are treated alike."

The Court pointed out that no classification at all had been made in the case before it and continued:

"So that where the revenue producing property of all other churches continues taxable, and the revenue

producing property of this church is made exempt, such exemption can be nothing else than an arbitrary discrimination between the property of the appellee and all other property of the same species or kind held by similar corporations, and such an arbitrary exemption must be void under Article 15 of the Declaration of Rights. Not only is it unlawful for the legislature to exempt one man's property and tax another of exactly the same kind, but the legislature may not impose a tax upon the property of one person at one rate, and upon the property of another at a different rate. A fortiori, the legislature should not tax the revenue producing property of all churches except one, and for this prescribe, not a different rate, but no rate at all; in other words, exemption."

In Wells v. Commissioners of Hyattsville, 77 Md. 125, 26 Atl. 357, 20 L. R. A. 89, where an act applicable to Hyattsville, Prince Georges County, exempting all personal property from taxation, was held unconstitutional as in violation of Article 15, the Court said:

[fol. 37] "Its predominant object is to provide, by a fixed enactment, equality in taxation, and to prevent, as far as possible, the burden of supporting the government from falling upon some individuals to the exclusion or exemption of others. * * * Its theory is that the distribution of the burden over every class of property alike will lessen the proportion of each individual's contribution, whereby oppressive exactions from the owners of any particular class of property will be impossible. * * * Under the pretext of granting exemptions, different classes of property cannot be successfully stricken from the tax lists so as to destroy the equality prescribed by the fundamental law, and eventually to reduce the taxable basis to one kind of property alone. Reducing the taxable basis to land by first excluding personal property altogether, and then exempting buildings and improvements, is a perversion, and not a legitimate exercise, of the conceded authority to make valid exemptions. If this be not so, then the very power to exempt might be carried to the length contended for, and, if carried that far, it would effectually abrogate the fifteenth article of the declaration of rights."

Similarly in Schley v. Lee, 106 Md. 390, 67 Atl. 252, where the statute provided for deduction of the value of Baltimore

City stock in assessing the value of shares of a corporation holding same, but made no such provision in the case of an individual, the Tax Commissioner was restrained from making such deduction as being unconstitutional, the Court saying:

"A further, and from a legal standpoint more serious, result that would follow the adoption by the Tax Commissioner of his proposed plan of assessing this company's assets would be an unjust and unlawful discrimination between the liability of Baltimore City stock and like securities to taxation when held by a private person and their practical exemption from that liability when held by a corporation. Such result as that involves a violation of the basic principle of equality and uniformity of taxation, asserted by Article 15 of the Declaration of Rights, which cannot be viewed with the slightest degree of toleration by this Court. The power of the Legislature, when State policy [fol. 38] and the public interest require it, to exempt with reasonable limits certain classes of property from taxation has been recognized by numerous decisions of this court, but it has always been held that the power cannot be so exercised as to destroy the equality prescribed by the fundamental law. Wells v. Hyattsville, 77 Md. 140; Prince Georges Co. v. Laurel, 70 Md. 443; Simpson v. Hopkins, 82 Md. 478."

And in Baltimore v. Cahill, 126 Md. 596, 95 Atl. 473, the Court declared unconstitutional the exemption of property owners, benefited by the opening of certain sections of a highway, from assessment under the general law. The Court said:

"The effect of the Acts of 1914, c. 470, we think, is to create an arbitrary and unreasonable exemption from taxation and is not based upon a proper and reasonable classification. * * * It makes a discrimination in favor of the owners of property abutting upon this street which is denied to the owners of property abutting upon every other street in Baltimore City which has been or which may hereafter be opened. * * * It does not relate to a species, but to particular individuals of a class."

The receiver relies upon a line of Maryland cases which recognize the validity of the exemption from taxation of the B. & O. Ry. Co. and certain other corporations, granted at the time that these corporations were organized. Typical of these cases are State v. B. & O. R. Co., 48 Md. 49, and B. C. A. R. Co. v. Ocean City, 89 Md. 89. We think, however, that there is a manifest difference between the state's granting an exemption from taxation to persons who propose to organize a corporation which will presumably be of benefit to the public, as an inducement to capitalists to invest money in the enterprise (see Mayor, etc., v. B. & O. Railroad, 6 Gill 288), and granting an exemption to a corporation already organized and engaged in business. In the one case the state is waiving the right to tax in consideration of securing a public benefit; in the other it is granting an exemption without consideration, for, as pointed out above, the railroad having dedicated its prop- [fol. 39] erty to a public use is not entitled to discontinue the service because of its insolvency. At all events, the cases of State v. B. & O. R. Co. and B. C. & O. R. Co. v. Ocean City were urged upon the Court of Appeals of Maryland as justifying the exemption granted in the Starr Church case, and were held not to justify it; and we must follow the decisions of Maryland as to the meaning of the provisions of the Constitution of that state and as to the application of prior decisions to questions arising thereunder. The only Maryland case since the Starr Church case considering the validity of a tax exemption statute, Baltimore v. German Fire Ins. Co., 132 Md. 380, 103 Atl. 950, which upheld an exemption from taxation of mortgages held by domestic fire insurance companies, distinguished the Starr Church case on the ground that the exemption granted there (as here) "was to a single corporation and not to a class".

The argument is made that the statute here in question constitutes a contract with the railroad, just as did the charter of the B. & O., and that same cannot be ignored in view of the fact that the railroad has been operated under and in reliance upon it. The answer to this is that contract cannot be predicated of an unconstitutional statute—that the legislature cannot bind the state by a statute which it has no power to enact. 26 R. C. L. 305; Memphis, etc., R. Co. v. Gaines, 97 U. S. 697.

Finally, we think that the statute violates Article 3, Section 33, of the Maryland Constitution which provides:

"The General Assembly shall not pass local or special laws in any of the following enumerated cases, viz.: For extending the time for the collection of taxes, granting divorces, changing the name of any person, providing for the sale of real estate belonging to minors or other persons laboring under legal disabilities, by executors, administrators, guardians or trustees, giving effect to informal or invalid deeds or wills, refunding money paid into the State Treasury, or releasing persons from their debts or obligations to the State, unless recommended by the Governor or officers of the Treasury Department. And the General Assembly shall pass no special law for any case for which provision has been made by an existing [fol. 40] general law. The General Assembly at its first session after the adoption of this Constitution, shall pass general laws providing for the cases enumerated in this section which are not already adequately provided for, and for all other cases where a General Law can be made applicable."

The statute in question is not a law for a special purpose but a special law. It applies not to the public at large or to a class but to a single taxpayer. See the Starr Church case and 25 R. C. L. 65. It relieves a single corporation from obligations due the state, and does this without recommendation of the Governor or officers of the Treasury Department. Moreover it deals with a matter covered by the general law—i. e., taxation and exemption therefrom. See Code of Maryland, Article 81, Section 6, Paragraphs 1 and 2; Section 7, paragraph 16; Section 7, paragraph 21. It would seem to require neither argument nor citation of authority to establish that this constitutional provision was intended to prevent exactly the sort of thing attempted by this statute, viz., the granting of special benefits or exemptions to particular individuals with respect to matters covered by the general laws of the state. The Starr Church case is directly in point. The court there said:

"Again, we think this act is invalid because in conflict with article 3, section 33, of the Constitution of Mary-

land, which provides that 'the General Assembly shall pass no special law for any case for which provision has been made by an existing general law.' Section 4, art. 81, of the Code, title 'Exemptions', specifies several different classes of property which shall be exempt from taxation, viz.: 'To houses or buildings used exclusively for public worship, nor to the furniture contained therein, nor to the parsonage connected therewith, nor to the ground appurtenant to such houses, nor to buildings so exclusively used for public worship or as parsonages which are necessary for the respective uses thereof.' All property of the kind thus described is exempt from taxation. Here, then, is a general law declaring in what cases the property of religious bodies shall be exempt, and specifying in detail just what kinds of such property shall [fol. 41] enjoy exemption; but Acts 1904, p. 474, c. 263, is a special law providing exemption for the property of a religious body. When the cases in which the property of religious bodies shall have exemption are already covered by a general law, it is a special law for a case for which provision has been made by an existing general law, and as such is void because in contravention of article 3, section 33, of the Constitution.

"We think, in the present case, that this is a special law exempting the wharf property of the appellee from municipal taxation, and is void, because it relates to the exemption from taxation of the property of a religious body, and this is a subject for which provision has already been made by an existing general law, namely, article 81, section 4, of the Code. The special laws contemplated by the Constitution are those that provide for individual cases. The object of the provision of the Constitution relied on was to prevent the abuses that occurred in the great multiplicity of legislation for particular and individual cases, and not to prevent legislation to meet the wants of communities less extensive in their territorial limits than the state."

See also Prince Georges County v. B. & O. R. Co., 113 Md. 179, 77 Atl. 433; Baltimore City v. Allegany County, 99 Md. 1, 57 Atl. 632; Chrisfield v. C. & P. Tel. Co., 131 Md. 444, 102 Atl. 751; Westminster v. Consolidated Public Utilities Co., 132 Md. 374, 103 Atl. 1008.

We have examined the cases of Mayor, etc., of Baltimore v. United Railways, 126 Md. 39, 94 Atl. 378, and Board of Police Com'rs v. McClenehan, 131 Md. 315, 101 Atl. 786, and we do not think that they are in point. In both, the acts in question were upheld on the ground that they dealt with matters not covered by general laws.

For the reasons stated, we think that there was error in the decisions rendered by the court below, and same are accordingly reversed and the cases remanded for further proceedings not inconsistent herewith.

Reversed.

[fol. 42] In United States Circuit Court of Appeals, Fourth Circuit

No. 3347

Mayor and City Council of Baltimore, Appellant,

versus

George Weems Williams, Receiver of the Washington, Baltimore and Annapolis Electric Railroad Company, Appellee

Appeal from the District Court of the United States for the District of Maryland

Decree—Filed and entered October 8, 1932

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the District Court of the United [fols. 43 & 44] States for the District of Maryland, at Baltimore, for further proceedings in accordance with the opinion of the Court filed herein.

October 8, 1932.

John J. Parker, Senior Circuit Judge.

October 22, 1932, the petition of appellee for a stay of the mandate is filed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE—Filed October 22, 1932

Upon the application of the appellee George Weems Williams, Receiver of the Washington, Baltimore and Annapolis Electric Railroad Company, by his counsel George Weems Williams and William L. Rawls, and for good cause shown,

It is ordered that the mandate of this Court in the above case be and the same is hereby stayed pending the application of the appellee in the Supreme Court of the United States for a writ of certiorari to this Court unless otherwise ordered by this or the said Supreme Court and provided said application is filed in the said Supreme Court within thirty days from this date.

October 22, 1932.

John J. Parker, Senior Circuit Judge.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 45] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 5, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.